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 13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 OAKLAND DIVISION

17 NATIONAL PUBLIC RADIO, INC., and ERIC) CASE NO. 4:18-cv-5772-DMR
 18 WESTERVELT,)
 19 Plaintiffs,) **PLAINTIFFS' NOTICE OF MOTION AND**
 20 v.) **MOTION FOR ORDER TO SHOW CAUSE RE:**
 21 UNITED STATES DEPARTMENT OF) **CONTEMPT OF COURT'S 12/4/19 ORDER**
 22 VETERANS AFFAIRS,)
 23 Defendant.) Date: March 26, 2020
 24) Time: 1:00 p.m.
 25) Courtroom: 4, 3rd Floor
 26) Assigned to the Hon. Donna M. Ryu
 27) Action Filed: Sept. 20, 2018

28 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

29 PLEASE TAKE NOTICE that on March 26, 2020, Plaintiffs National Public Radio and Eric
 30 Westervelt (collectively, "NPR"), will and hereby do respectfully move this Court for an order to show
 31 cause why Defendant United States Department of Veterans Affairs ("VA" or "Defendant") should not
 32 be held in contempt of Court for violating this Court's December 4, 2019, Civil Conference Minute
 33 Order by failing to produce 1000 responsive pages of records by January 17, 2020.¹

1 This Motion is brought pursuant to Local Rule 7-2, however, NPR is concurrently filing a motion for administrative relief seeking more expedient resolution of this Motion as this Court deems

14 This Motion is based on this Notice, the Memorandum of Points and Authorities below, the
15 Declaration of Thomas R. Burke with Exhibits A-E, which is filed concurrently herewith, all records and
16 papers on file in this action, any oral argument, and any other evidence that the Court may consider in
17 deciding this Motion.

19 | Dated: February 5, 2019

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

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28 necessary, in light of the Defendant's ongoing records-review process and upcoming production deadlines.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 4, 2019, this Court issued a Civil Conference Minute Order that stated, *inter alia*, that “Defendant shall make an initial production of 1,000 pages to Plaintiff by 1/17/2020 then shall produce 2,000 pages by no later than the twentieth day of each month thereafter until production is complete.” Doc. 43. This Order was issued after a further Case Management Conference during which counsel for Plaintiffs National Public Radio and Eric Westervelt (collectively, “NPR”) explained that the Defendant in this matter has repeatedly delayed its production and failed to meet its obligations under the Freedom of Information Act (“FOIA”).

As evidenced by its January 17 production, Defendant is continuing to delay its production, now by artificially boosting its page production numbers with blank pages, indecipherable spreadsheets that are improperly formatted in a manner that inflates the number of pages produced and is indecipherable, and thumbnail images. Although Defendant purported to produce 6,498 pages of documents on January 17, NPR estimates that the production included only about 300-400 substantive, decipherable pages, far short of this Court’s requirement of 1,000 pages.

Although counsel for NPR immediately brought the production deficiencies to the attention of Defendant’s counsel, rather than correct the production errors and make up for the hundreds of records that were not produced, Defendant is steadfast that its production was proper. NPR understands that Defendant’s counsel is out of the office this week, and consents to any extension of time as necessary for Defendant to respond; NPR brings this Motion on an expedited schedule in order to bring to the Court’s attention the seriousness of the violations prior to the upcoming February 20 production. In light of Defendant’s intransigence, an OSC is warranted to ensure that future productions do not involve the same gamesmanship and disregard for the Court’s order.

II. BACKGROUND

A. This Court’s December 4, 2019 Order

As NPR has discussed in prior submissions to this Court, Defendant has repeatedly delayed the timely production of documents in response to NPR’s FOIA request submitted over a year and a half ago; meanwhile, ongoing news stories demonstrate the urgency of obtaining these records. *See, e.g.*,

1 Doc. 36 at 1-2; Doc. 40 at 4. Defendant's delay has included unilaterally taking additional time beyond
 2 Court-imposed deadlines to supplement the production and Vaughn index, as well as failure to include
 3 emails in the initial round of production. *Id.* This delay was discussed at the Further Case Management
 4 Conference held by this Court on December 4, 2019. On that date, this Court issued an Order plainly
 5 stating that Defendant was to produce 1,000 pages by January 17, 2019, and then 2,000 pages no later
 6 than the twentieth of each month thereafter. Doc. 43.

7 On December 26, 2019, several weeks after the Court's Order, Defendant brought an
 8 administrative motion seeking clarification of the Order, arguing that the Order should be amended to
 9 require only *review* of 1,000/2,000 pages – rather than *production* of 1,000/2,000 pages. Doc. 47. This
 10 Court denied Defendant's motion on January 2, 2020, effectively affirming that its Order should be read
 11 according to its plain language, which requires the production, rather than the review, of a certain
 12 number of pages each month. Doc. 49.

13 **B. Defendant's Deficient January 17 Production**

14 On January 17, 2020, Defendant purported to produce to NPR 6,498 pages of documents. Of
 15 these pages, however, 6,032 pages consisted of a single email attachment. The majority of the pages in
 16 that attachment appear to be blank pages. *See, e.g.*, Ex. A (examples of blank pages in the attachment).
 17 The remainder of the pages in the attachment appear to be spreadsheet excerpts that were formatted in a
 18 manner that inflates the number of pages produced and makes the spreadsheet indecipherable. *See, e.g.*,
 19 Ex. B (examples of indecipherable pages in the attachment). For instance, those pages contain lists of
 20 numbers without headers, or blank charts. *Id.* Thus, at least 6,032 pages in the production are not
 21 meaningful, substantive pages and should not be counted toward the 1,000-page requirement.

22 The 466 remaining pages are also artificially inflated by blank pages and thumbnail attachments.
 23 *See, e.g.*, Ex. C (examples of blank pages); Ex. D (examples of thumbnail attachments). The thumbnail
 24 attachments appear to be logos and similar pictures that are embedded in emails, and they do not contain
 25 substance or require review. These documents, also, are not meaningful, substantive pages and should
 26 not be counted toward the 1,000-page requirement.

27 **C. Attempts to Resolve This Issue Without Court Intervention**

1 Counsel for NPR has attempted to resolve these issues informally through discussions with
 2 Plaintiff's counsel. On Tuesday, January 21, NPR's counsel, Selina MacLaren, emailed Plaintiff's
 3 counsel, Adrienne Zack, to confirm that the production as received was not an error. Specifically, Ms.
 4 MacLaren wrote, "we are seeing thousands of blank documents and many documents that are impossible
 5 to decipher – it appears the latter category may be charts or tables that should have printed horizontally.
 6 Please let us know if that is an error." *See Declaration of Thomas Burke ("Burke Decl."), ¶ 6.* Ms. Zack
 7 replied, *inter alia*, "There is no error that I am aware of." *Id.* On January 28, Ms. MacLaren followed
 8 up with an email outlining several deficiencies in the production, including the blank pages, improperly
 9 formatted spreadsheets, and thumbnail attachments. *Id.* In that email, Ms. MacLaren requested that
 10 Defendant agree to remedy these issues by producing 3,000 pages in the February production.² *Id.* On
 11 February 2, Ms. Zack, on behalf of Defendant, declined. *Id.* Ms. Zack conceded that 6,032 pages of the
 12 production consisted of an .xlsm file (*i.e.*, an Excel spreadsheet) that was a single attachment to an
 13 email, but maintained that the attachment was responsive and that "[e]ach page required at least some
 14 review." *Id.* With regard to the thumbnail attachments, Ms Zack stated, "These images are responsive
 15 as they are attachments to emails, as identified by the review software. It cannot be avoided because of
 16 the review software." *Id.*

17 The following day, NPR's counsel explained, "We do not believe that the Court in its 12/4 Order
 18 intended to include blank pages, indecipherable spreadsheets, and thumbnail attachments in the page
 19 count. Any contrary conclusion would allow the VA to continue to delay its substantive production by
 20 producing huge, mostly-blank attachments and thumbnails." *Id.* NPR's counsel offered to participate in
 21 a meet-and-confer if Defendant determined that it was willing to reconsider its position.³

22 ² NPR's counsel requested 3,000 pages in the February production under the assumption that
 23 some of the already-produced pages would be produced again, and the February production would thus
 24 include both the February and remedied January productions.

25 ³ NPR's counsel understood that Defendant's primary counsel unexpectedly had to be out of
 26 office for personal reasons from January 30 to February 3, and thus proposed a meet and confer for
 27 February 4. On February 4, Defendant's primary counsel explained that she had to extend her time out
 28 of the office until February 10, 2020. Due to the seriousness of the violations of the Court's order,
 Defendant's position that its January production was proper, and the upcoming February 20 production
 deadline, NPR is filing this Motion to bring these issues to the Court's attention at the earliest
 convenience. In light of defense counsel's unavailability, NPR consents to any additional time
 necessary for Defendant to respond to this Motion or the concurrently-filed Administrative Motion to
 accommodate counsel's schedule.

1 **III. ARGUMENT**

2 In a motion for an Order to Show Cause Re: Contempt, “the moving party has the burden of
3 showing by clear and convincing evidence that the contemnors violated a specific and definite order of
4 the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply.”
5 *Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir.2004) (citation
6 and quotation marks omitted).

7 Here, clear and convincing evidence – documents from the production itself – establish that
8 Defendant has violated this Court’s specific and definite December 4, 2019, Order to produce 1,000
9 documents. Those documents show that Defendant has artificially inflated its production numbers by:
10 (1) including thousands of blank pages in the page count, *see* Exs. A, C; (2) formatting an Excel
11 spreadsheet in a manner that maximizes the number of pages processed but eliminates NPR’s ability to
12 decipher the spreadsheet, *see* Ex. B; and (3) including thumbnail attachments in the page count, *see* Ex.
13 D. Excluding these pages reveals that Defendant has produced, at most, roughly 300-400 pages, far
14 short of the requirement set forth in this Court’s December 4, 2019 Order. Allowing Defendant to
15 artificially inflate its production numbers by producing thousands of blank, indecipherable, or otherwise
16 meaningless pages would indefinitely delay Defendant’s substantive production and essentially render
17 this Court’s December 4 Order futile. Moreover, without an order from this Court, Defendant is likely
18 to repeat the same behavior with each of its additional productions.

19 Accordingly, Defendant bears the burden of demonstrating why it failed to comply. In the event
20 that Defendant cannot meet its burden, NPR respectfully requests that this Court order Defendant to
21 supplement its March production by 600 pages to make up for the pages missing from the January 17
22 production. NPR further respectfully requests that this Court confirm that blank pages, indecipherable
23 spreadsheets, and thumbnail attachments will not count toward the page requirement for future
24 productions.

25 **IV. CONCLUSION**

26 For the foregoing reasons, this Court should enforce its December 4, 2019 Order by issuing an
27 Order to Show Cause why Defendant should not be held in contempt for failing to produce 1,000
28 responsive pages on January 17, 2020.

1
2 Dated: February 5, 2019

3 Respectfully submitted,

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